

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

FERNANDO DELGADO,

Defendant and Appellant.

B260431

(Los Angeles County
Super. Ct. No. BA406196)

APPEAL from the judgment of the Superior Court of Los Angeles County. Ronald S. Coen, Judge. Affirmed.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

A jury found defendant and appellant Fernando Delgado guilty of four counts of premeditated, attempted murder. The jury also found true special allegations regarding firearm use, infliction of great bodily injury, and that the attempted murders were committed for the benefit of, at the direction of, or in association with a criminal street gang. Defendant was sentenced to a state prison term of 100 years to life, plus 40 years.

Defendant raises two contentions on appeal. He contends the trial court committed prejudicial error in violation of his Sixth Amendment rights by allowing the prosecution's gang expert to base his opinion in part on testimonial hearsay. He also contends his conviction on count 4 must be reversed because the court prejudicially instructed the jury with CALJIC No. 8.66.1 regarding the kill zone theory of liability.

We conclude any errors in the admission of the testimonial hearsay and instructing the jury with CALJIC No. 8.66.1 were harmless beyond a reasonable doubt. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was charged by information with four counts of premeditated attempted murder (Pen. Code, § 187, subd. (a), § 664; count 1—Andrew G., count 2—Alicia B., count 3—Larry G., count 4—Christopher R.).¹ As to counts 1, 2 and 3, it was alleged that defendant caused great bodily injury to the victims. (§ 12022.53, subd. (d).) As to all counts, it was further alleged that defendant personally used and discharged a firearm and committed the offenses for the benefit of, at the direction of, or in

¹ We identify the parties by their first names only to protect their privacy.

association with a criminal street gang. (§ 12022.53, subds. (b)&(c), § 186.22.)

The charges arose from a shooting on November 3, 2012. The trial testimony revealed the following facts material to our discussion.

In November 2012, Alicia lived in a duplex on South Arizona Avenue in east Los Angeles with her boyfriend, Larry, her four children, including her eldest son, Christopher, and her brother Augustine. Their home was located in an area claimed by a gang known as Mariana Maravilla. Alicia had lived in the neighborhood her whole life, and knew some people in the area were Mariana gang members, including someone she went to school with called “Bam Bam.” However, none of her children were involved with gangs. Her boyfriend was a member of a gang known as the Santa Fe Locos, but he was no longer “active” in the gang. Larry did not hang out or talk to other members of his former gang who were from a different neighborhood.

On November 3, Alicia and Larry came home from the store and found a Hispanic male in their driveway, attempting to peer into their home. Larry told the man to leave. The man pointed a gun at them and told them to “[g]et back.” Alicia recognized the man was defendant, but did not immediately tell Larry she knew who it was. Defendant left and Alicia went to her neighbor’s home (the other home in the duplex) to borrow a phone to call 911.

While Alicia waited for the police, Larry and her son Christopher left in Larry’s car to drive around the neighborhood to see if they could find the man. When the police arrived, Alicia told them the man with the gun was a heavysset Hispanic male, with glasses, wearing a dark shirt with the word “Cali” printed

on it, and a black baseball cap. Larry and Christopher returned about 15 to 20 minutes later without having found anyone who looked like the man with the gun. The police took Alicia's report and left.

Christopher then left in his car to pick up his friend Andrew, who lived a couple of blocks away, because they planned to go to a friend's party that evening. Christopher and Andrew returned a few minutes later and Christopher parked his car in front of the house. Alicia and Larry were still standing outside as Christopher and Andrew got out of the car. Alicia and Larry were close to the house, but still on the driveway. Christopher was in front of his car, and Andrew was standing near him, but more on the passenger side of the car. As they stood talking, a car drove by.

Andrew told Christopher the people in the car were looking at them as they drove by. The car then reappeared and pulled in behind Christopher's car. The front passenger door opened. Defendant stepped out and immediately started firing his gun. Christopher saw the muzzle flash and dove to the ground in front of his car to try to avoid being shot. Alicia heard "more than five shots" and saw Larry fall to the ground, bleeding. Alicia did not realize she had also been shot. She started to run to her neighbor's house to call the police to come back, when Christopher and Andrew told her she had blood on her back. She noticed that Andrew was bleeding as well. Alicia yelled for her neighbor to call the police.

The police and paramedics arrived. Alicia recognized one of the deputies as the same one who had responded to her earlier 911 call. She told the deputy that the shooter was same man who had been at their house earlier and pointed a gun at them.

Larry, Andrew and Alicia were transported to the hospital to be treated for gunshot wounds.

Alicia later identified the person who shot them as defendant, whom she knew as “Tank.” She knew defendant from the neighborhood and because his brother had been a friend of her husband’s before he passed away. She had no doubt that defendant was the shooter. She said she had not told anyone earlier that she knew who the shooter was because she was scared. Christopher also recognized the shooter as defendant. He recalled that defendant had “hit [him] up” at school one time, meaning that he had asked him if he was in a gang. On the night of the shooting, he did not tell the police he recognized defendant from the neighborhood because he was scared. Christopher knew that bad things could happen if he “snitched” on a gang member. He described the shooter as having been dressed in all black, with a mustache and glasses. When Christopher later identified defendant in a photographic lineup, he was “very certain” he was the shooter.

Alicia testified that sometime before November 3, she had been at home when her younger brother Jesus came over. “He was pumped up, kind of like sweating, like – like he had just went through something.” Jesus appeared to be worried and was “pacing” back and forth in her house. He told Alicia that Augustine, their older brother, had “got him into some shit with the guys from Mariana.” He said they got into a fight with members of the Mariana gang at Mina’s Market, which was just a couple of blocks from her home. Jesus said that because Augustine talks loud, the gang members thought he was disrespecting them. During the conversation, Jesus started to cry and asked her what he should do.

At the time of the fight, Augustine was living with their mother, about a block from Alicia's home. A couple of days after Jesus told Alicia about the fight, Alicia saw tagging by the Mariana gang (two M's) on her mother's front gate. Alicia had never seen any kind of tagging on her mother's home before. Her brother Augustine then came to live with her, and was still living with her in November 2012.

Deputy Rubin Rosas testified that he responded twice to the residence on South Arizona Avenue the night of the shooting. The first time he responded was just after 7:30 p.m. Alicia told him that she and her boyfriend had come home from the store and found a man crouching in their driveway and peering into their house. When they confronted the man, he pulled a handgun from the waistband of his pants and told them to "get the f--k back," and then he walked away. Alicia told him that her boyfriend and son had gone looking for the man. Deputy Rosas obtained a suspect description from Alicia, and he and his partner patrolled the neighborhood to see if they could find anyone matching that description.

Deputy Rosas returned to Alicia's home at 8:27 p.m. and found her crying "hysterically" on the driveway and two other males nearby bleeding from apparent gunshot wounds. Alicia told Deputy Rosas that the shooter was the same man with the gun who had been at their home less than an hour before.

Deputy Rosas also spoke to Christopher, who was not injured during the shooting. Christopher reported that a newer model Toyota Camry drove by their house slowly while they were all standing outside on the driveway. Christopher said it then pulled up behind his car and a man got out of the front passenger seat and immediately began shooting. Several shots were fired in

his direction, so he dove for cover in front of his car. After the shooting stopped and he saw the car pull away, he saw that his mother, Larry and his friend Andrew were all bleeding. Christopher's description of the shooter was substantially the same as his mother's from earlier in the evening.

The jury heard and read a transcript of a jailhouse telephone call between defendant, his mother, and an unidentified female in which defendant said in Spanish "*the people from over there on Arizona*" should "*get lost.*" He said if they did not get lost, he would "*get back at them fools.*"

Detective Antonio Guillen, a 22-year veteran of the Los Angeles County Sheriff's Department and a gang detective, testified as the prosecution's gang expert. Part of Detective Guillen's assignment as a gang detective in east Los Angeles is monitoring the Mariana Maravilla gang. Detective Guillen was also the lead detective investigating the shootings on November 3, 2012.

Detective Guillen explained his background, training and investigation of numerous gang-related crimes. He explained gang culture generally and identified the common tagging and names associated with the Mariana gang, including the letters "MM" and "MMV." Detective Guillen said there were 140 documented members of the gang, but that several of the members had claimed the actual number was closer to 250. He said the gang's primary activities were vandalism, narcotics sales, thefts, shootings, extortion and murder. He attested to two predicate offenses committed by Mariana gang members in which he was the investigating detective.

Detective Guillen was familiar with defendant as a known Mariana gang member with the moniker Tank. Detective Guillen

considered him to be one of the active members, along with individuals known as Bam Bam, “Husky,” and “Boy,” who were all members of the same clique. Detective Guillen authenticated various photographs depicting defendant’s gang-related tattoos, including the words “Mariana Maravilla,” the letters “MM” and the letters “MMV.”

After Detective Guillen initially arrested defendant, he heard a phone call made by defendant to a family member. Detective Guillen had not specifically told defendant he had been arrested for the shootings at Alicia’s home on Arizona Avenue, but during the phone call, defendant said he had been arrested and mentioned the “people on Arizona.”

During the course of the investigation, Detective Guillen learned that, a few months before the shooting, there had been a fight between Alicia’s brother Augustine and members of the Mariana gang, including Bam Bam. He spoke with Augustine over the telephone and Augustine confirmed there had been a fight and he had beaten up Bam Bam. Detective Guillen tried to arrange to meet with Augustine, but was unable to do so. He could not locate Augustine, despite multiple efforts. Detective Guillen opined that generally there would be a response to a gang member getting beaten up in a fight, particularly a member with status like Bam Bam. It is important to the gang to respond in order to maintain respect.

During the investigation, Detective Guillen also learned that the “talk” in the neighborhood was that “Mariana” was responsible for the shootings. Detective Guillen was unable to convince Andrew, one of the victims, to comply with the subpoena to come to court because Andrew and his family were afraid of retaliation if he testified.

Detective Guillen said Alicia identified defendant in a photographic lineup and was “scared” and “crying” when she did so. She did not mention, at that time, that she knew defendant’s name. When he later learned that Alicia knew the shooter was someone from her neighborhood known as Tank, he asked her why she had withheld that information. Alicia told him she was scared of retaliation by the gang against her and her family but she changed her mind and decided to speak up because the father of her children had been gunned down and no one was ever prosecuted because no witness would come forward.

Detective Guillen answered a hypothetical based on the facts of the shootings and stated his opinion that the shootings were carried out in a fashion that demonstrated they were committed in association with and for the benefit of a gang.

Detective Guillen escorted Alicia and her family for court appearances to make them feel more comfortable. He explained that at the preliminary hearing, he saw defendant’s brother, Antonio Delgado, approach Christopher, Alicia and Larry in the courthouse hallway. Detective Guillen walked up to the group and told Mr. Delgado he had to leave. Detective Guillen warned Mr. Delgado not to speak to witnesses. Mr. Delgado said he was just saying hello because he knew the family. After Mr. Delgado walked away, Christopher told Detective Guillen that Mr. Delgado had given him a business card and told him that if he did not say anything, Mr. Delgado would buy him a car.

Defendant testified in his own defense. Defendant said he grew up in the Maravilla neighborhood of east Los Angeles and was “jumped in” to the Mariana Maravilla gang when he was 16 or 17 years old. Defendant admitted he had several prior convictions, including possession of narcotics with a firearm and

two firearm possession charges. He pled guilty to those crimes and served his time because he was guilty of those offenses, but he denied shooting at Alicia and her family.

Defendant knew Alicia and her brother Augustine from the neighborhood. Alicia's mother's house was located only about a block away from his mother's home. Defendant also knew Alicia's husband before he passed away. He never had any trouble with the family and denied ever threatening them.

Defendant was aware that Augustine got into a fight with two Mariana gang members, Bam Bam and "Mousy," sometime around July 2012. They apparently got "whipped" by Augustine and they all sort of "laughed about it." Defendant said he teased and "ribbed" them about it because Augustine was not a gang member or someone important. He was a friend they all knew from the neighborhood. It did not make him want to get revenge on Augustine. He said that if a Mariana gang member felt they had been disrespected, then the member would take care of the situation himself, and would not wait months to do it. If a member was disrespected and did not handle it, the gang would see him as a coward. Defendant said he would not "ever take up" another Mariana member's fight because it is not his business. He denied that gang members "back up" their fellow gang members in order to maintain respect for the gang as a whole. Defendant said he was not aware of anyone in the gang that was worried or bothered by the fight. By November, it was a "dead issue." Defendant also said the gang would never retaliate against the wife or sister of someone who had disrespected them.

Defendant said he did not "hit up" Christopher at school or anywhere. He also never asked his brother to talk to or bribe any witness.

Defendant testified that on November 3, 2012, he went to a barbeque at his friend Manny's house. Manny's moniker is Bam Bam. Defendant said he left Manny's house around 7:00 p.m. to visit his friend Christina Ledesma and her boyfriend. Christina lived about three or four miles from where the shooting occurred. Defendant stayed at Christina's house until around 10:00 p.m., and only left briefly a couple of times with Christina's boyfriend to buy beer at the liquor store down the block. While he was at Christina's, he received a couple of phone calls telling him about the shooting in his neighborhood.

Defendant acknowledged the recording of the phone conversation between him and his mother while he was in jail. He denied the translation of the Spanish portion of the recording, including the word *mochen*, meant that he told his mother the people living on Arizona should "*get lost*" or he would get back at "*them fools*." He said the Spanish phrase he used was slang for "break bread." He said the Spanish translator was "way off." He was telling his mother he wanted her to get people to contribute money to help pay for an attorney for him and he had a lot of friends that lived on Arizona Avenue and that is what he was referring to in the call.

On cross-examination, defendant admitted he used to sell Christina and her boyfriend drugs and that, at the time he was arrested for the shootings, they owed him money. The jury heard and read the transcript of a jailhouse phone call in which defendant said in a derogatory way that Christina's boyfriend was still paying his drug debt by paying money to defendant's mother.

Defendant's brother, Antonio Delgado, testified he knew Alicia because they had gone to school together. He also knew

her family and particularly her husband, who had passed away. Mr. Delgado admitted he approached Christopher in the hallway of the courthouse during the preliminary hearing. He said he did so only to express his sympathies to the family for what they had gone through and to ask Christopher if he really felt that his brother had shot at them because he believed his brother was innocent. Mr. Delgado denied threatening Christopher about testifying. He said he gave Christopher a business card to be a professional. He said the detective then came up to him and told him not to talk to the witnesses. Mr. Delgado said he ran into Christopher a few days later at the gym and asked him again whether he was sure the shooter had been his brother. He again said he was not trying to make any threat to Christopher. Mr. Delgado knew his brother was a member of the Mariana gang and he did not approve it.

Christina also testified for the defense. She said that she and defendant had been good friends since they were both about 13 years old, and defendant would often come over and “hang out” with her and her boyfriend. On November 3, 2012, defendant came over to visit with them around 6:00 or 7:00 p.m. He did not leave until around 11:00 p.m., except for two quick trips to the store with her boyfriend. Each time they were only gone a few minutes as they just walked down the block to the store. She remembered the evening because defendant got a phone call at some point which seemed to upset him, so the night was memorable. Defendant also called her after he was arrested and told her he had been arrested for a shooting. Christina said she had been putting money “on the books” for defendant while he was in jail because of their friendship. Christina was aware

that defendant was a member of the Mariana gang with the moniker Tank.

The prosecution called Detective Guillen back to the stand for rebuttal. He testified he was fluent in Spanish and that the Spanish word *mochen* used by defendant in the phone call with his mother meant to “sever ties,” to “get lost,” to “get out of here.” He had never heard it to mean or refer to “breaking bread.”

The jury found defendant guilty on all four counts, as charged, and found the special allegations true. The court sentenced defendant to a state prison term of 100 years to life, plus 40 years.

This appeal followed.

DISCUSSION

1. The Admission of Augustine’s Statement to Detective Guillen

Defendant contends it was error for the court to allow Detective Guillen to testify about his telephone conversation with Alicia’s brother, Augustine, regarding the fight he had with Mariana gang members before the shooting. Defendant objected to the admission of such evidence as testimonial hearsay that violated his Sixth Amendment right to confront and cross-examine witnesses. The court ruled the evidence was permissible motive evidence that could be admitted through the prosecution’s gang expert without offending the Constitution.

While this appeal was pending, our Supreme Court decided *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*)² which concluded that “[w]hen any expert relates to the jury case-specific

² Defendant submitted a supplemental letter brief regarding *Sanchez*.

out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Sanchez*, at p. 686, fn. omitted.)

In so holding, the court explained that "[o]ur decision does not call into question the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in his field. Indeed, an expert's background knowledge and experience is what distinguishes him from a lay witness, and, as noted, testimony relating such background information has never been subject to exclusion as hearsay, even though offered for its truth. Thus, our decision does not affect the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise. Our conclusion restores the traditional distinction between an expert's testimony regarding background information and case-specific facts." (*Sanchez, supra*, 63 Cal.4th at p. 685.)

Rather, "[w]hat an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez, supra*, 63 Cal.4th at p. 686.)

Under *Sanchez*, we find it was *Crawford*³ error to allow Detective Guillen to testify about his out-of-court conversation with Augustine in which Augustine told him that, before the shootings occurred, he had gotten into a fight and beaten up Bam Bam, a Mariana gang member. Respondent does not contend that Augustine was unavailable to testify. Defendant had no opportunity to cross-examine Augustine, and did not forfeit the confrontation clause objection. The evidence was case-specific and admitted for its truth as it formed part of the basis for Detective Guillen's opinion about the gang-related motive for the shootings.

The question then becomes whether the admission of such evidence was prejudicial. *Crawford* error is analyzed under the federal harmless error standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (See *People v. Geier* (2007) 41 Cal.4th 555, 608.) Reviewing the whole record in accordance with this standard, we conclude the error was harmless beyond a reasonable doubt.

The record here demonstrates that even without Detective Guillen's testimony about Augustine's hearsay statement, the evidence of defendant's guilt and the gang-related nature of the crimes was substantial. First, the evidence of defendant's identity as the shooter was strong. Defendant was well known to Alicia and Christopher from the neighborhood and both expressed certainty about identifying defendant in photographic lineups. Further, the evidence was undisputed that defendant was a self-admitted member of the Mariana gang and friends

³ *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

with Bam Bam, another active member of the gang. Defendant's alibi defense was significantly impeached by the prosecution.

Further, before Detective Guillen testified, the jury heard from Alicia. She explained how her family had lived in the neighborhood for years and that the neighborhood was known to be territory claimed by the Mariana gang. She knew Bam Bam from the neighborhood and that he was a member of Mariana. She said that before the shootings occurred in November 2012, her family had never had any trouble with the gang. Then, sometime before the shootings, Alicia explained that her brother Jesus came over to her house, agitated and upset, and told her that their older brother Augustine had gotten him into "some shit with the guys from Mariana." He was sweating, pacing and started to cry as he explained they had fought with Mariana members at a nearby market.

Alicia said that at the time of the fight, Augustine was living with their mother, about a block from Alicia's home. A couple of days after Jesus told Alicia about the fight, Alicia saw tagging by the Mariana gang on her mother's front gate. Alicia had never seen any Mariana tagging on her mother's home before the fight. Augustine then came to live with her, and he was still living with her in November 2012 when the shootings occurred outside her home.

Thus, Detective Guillen's testimony about his conversation with Augustine was cumulative of Alicia's testimony. The admission of hearsay evidence that is merely cumulative of other direct evidence will ordinarily be deemed harmless. (*People v. Houston* (2005) 130 Cal.App.4th 279, 296; see also *People v. Jenkins* (2000) 22 Cal.4th 900, 1016.) Alicia's testimony was far more detailed and emotional about the fight and its impact on

her family, including her younger brother Jesus's extreme distress, and the tagging at her mother's home. There was also strong circumstantial evidence that defendant was the shooter. In a jailhouse phone call, defendant said in Spanish "*the people from over there on Arizona*" should "*get lost*," and if they did not get lost, he would "*get back at them fools*." Also, defendant's brother twice tried to persuade Christopher not to testify, in the courthouse and later at the gym.

Detective Guillen was on the witness stand for the better part of two days, and the testimony about his conversation with Augustine was relatively brief. The balance of Detective Guillen's testimony, including his expert gang opinions, rested on his extensive personal knowledge of defendant's activities and the activities of his gang and fellow gang members.

Alicia's testimony was sufficient to show a gang motive and Detective Guillen's extensive testimony, based on his own personal knowledge and experience, about gang culture, defendant's gang involvement, and Mariana's activities as a known street gang was substantial evidence supporting the gang enhancement. It was not dependent on the cumulative testimony about Augustine's fight with Bam Bam; a fight which even defendant acknowledged had occurred a few months before the shootings but which he downplayed as insignificant and something the gang members laughed about.

2. The Kill Zone Instruction

Defendant argues the court erred by giving CALJIC No. 8.66.1 regarding the prosecution's kill zone theory of liability with respect to the attempted murder of Christopher, the only victim who was not wounded (count 4).

We review claims of instructional error de novo. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.)

The jury was instructed with CALJIC No. 8.66.1 as follows: “A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. This zone of risk is termed the ‘kill zone.’ The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim’s vicinity. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a ‘kill zone’ is an issue to be decided by you.”

Defendant contends the instruction misled the jury as to the intent element for attempted murder. He argues the instruction erroneously allowed the jury to convict defendant on count 4 for the attempted murder of Christopher who was not the intended target simply because he was in an undefined zone of risk, without finding, as the law requires, that he had a specific intent to kill Christopher. Defendant did not object to the instruction, nor did he ask for a clarifying or amplifying instruction to correct any alleged ambiguities.

Respondent therefore argues the contention on appeal has been forfeited. Defendant had a duty to request a clarifying instruction if he felt the language of the instruction as proposed necessitated it. (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) Defendant urges us not to find forfeiture because the erroneous instruction affected his substantial rights. (Pen. Code, § 1259; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.)

The appropriate language for instructing a jury on the kill zone theory of attempted murder is currently under review by our Supreme Court in *People v. Canizales* (S221958; rev. granted Nov. 19, 2014). We need not resolve whether there is any error in the language of CALJIC No. 8.66.1, because the claimed error was harmless beyond a reasonable doubt.

The evidence demonstrated that the four victims were standing fairly close together in a group, talking to one another, on the driveway of Alicia's home. Christopher testified he saw defendant get out of the car, point his gun directly at them, and immediately start to fire. Christopher said he saw the flash of the gun before he dove in front of his car, trying to protect himself. He was plainly in the line of fire prior to taking cover. Alicia testified she heard at least four to five shots, enough shots to kill four individuals standing close together. The fact Christopher ultimately escaped injury when the three other victims were all hit does not establish that defendant lacked the requisite intent to kill Christopher. (See, e.g., *People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690 ["the fact that the victim may have escaped death because of the shooter's poor marksmanship" does not establish "a less culpable state of mind"].) The evidence was undisputed that defendant shot multiple times at fairly close range at a group of four individuals standing near to one another, hitting three of them. The method of the shooting demonstrated an intent to kill everyone in the group.

Moreover, the prosecutor did not mislead the jury with her argument. She argued defendant intended to kill each victim, and also argued a kill zone theory in the alternative. In so doing, she did not misstate the law regarding the requisite intent. She

explained that attempted murder requires the specific intent to kill. She also argued that with a kill zone theory of attempted murder, intent to kill may be established when defendant's conduct evinces an intent to kill everyone in a group in order to reach the intended target.

Finally, the jury found true the allegations that each of the four attempted murders was committed willfully, deliberately and with premeditation. The jury, by their verdicts, therefore expressly found that defendant harbored the intent to kill each of the victims.

DISPOSITION

The judgment of conviction is affirmed.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P. J.

FLIER, J.